absence of some technical requirement [11] or the presence of some ingredient against public policy.[12] The courts have thus upheld the legislatures in retrospectively repairing technical mistakes or validating contracts unenforcible because of illegality. A typical instance is found where the legislature validates a contract invalid at the time of negotiation because usurious.[13] Such decisions may be supportable[14] on the ground that it is not arbitrary for the legislature to give B a claim against A when it is predicated upon acts of the parties which almost consummated a legal obligation. It is not unreasonable to take away A's freedom from liability by discarding a legal formality or changing the public policy which prevented the obligation from arising. When the legislature goes beyond validating the substance of an obligation, however, and attempts to predicate one upon a transaction which did not approximate the creation of an obligation, it is not due process.[15] Such an attempt would be as arbitrary as to predicate a claim upon no previous transaction.

POWER OF THE DIRECTORS OF A CORPORATION TO FILE A VOLUNTARY PETITION IN BANKRUPTCY FOR THE CORPORATION. — The Bankruptcy Act of 1898,[1] as amended June 25, 1910, extended to a corporation the right to become a voluntary bankrupt.[2] Although, and indeed because the provisions of the act [3] regarding this matter are apparently unqualified, there has been considerable dispute as to their exact meaning and scope. The law is clear, although it is not expressly so provided in the act, that in the absence of statutory or charter restrictions, the directors of a corporation may file or authorize the filing of a voluntary

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[11] State *v.* Norwood, 12 Md. 195 (1858); Gibson *v.* Hibbard, 13 Mich. 214 (1865); Danforth *v.* Groton Water Co., 178 Mass. 472, 59 N. E. 1033 (1901).

[12] Gross *v.* U. S. Mortgage Co., 108 U. S. 477 (1883); Berry *v.* Clary, 77 Me. 482 (1885); Lewis *v.* McElvain, 16 Ohio 347 (1847); Hewitt *v.* Wilcox, 1 Metc. (Mass.) 154 (1840); Washburn *v.* Franklin, 24 How. Pr. (N. Y.) 515 (1861).

[13] Ewell *v.* Daggs, 108 U. S. 143 (1883); Welch *v.* Wadsworth, 30 Conn. 149 (1861).

[14] Many courts avoid the real issue by applying some set formula, such as: "no vested right to do wrong," Foster *v.* Bank, 16 Mass. 245, 273 (1819); "curing irregularities," Lane *v.* Nelson, 79 Pa. 407 (1875); Randall *v.* Krieger, 23 Wall. (U. S.) 137 (1874); or "a party has no vested right to a defense based upon an informality not affecting his substantial equities," COOLEY, CONSTITUTIONAL PROHIBITIONS, 7 ed., 529. Such formulæ merely state a result and so should not be used to justify a decision. They tend to cover up the fact that in this class of cases A will be compelled to surrender his property by force of legislative enactment and that alone. The problem should receive a direct answer on the ground that the legislature has, or has not, acted arbitrarily and so without or with due process of law.

[15] Medford *v.* Learned, 16 Mass. 215 (1819); Addoms *v.* Marx, 50 N. J. L. 253 (1888); Philip *v.* Heraty, 147 Mich. 473, 111 N. W. 93 (1907).

[1] See 30 U. S. STAT. AT L., § 544.

[2] While the amendment of 1910 first gave to a corporation the right to become a voluntary bankrupt, yet as prior to this time a corporation could admit its insolvency and express its willingness to be adjudged a bankrupt, and get a friendly creditor to file a petition against it, the change in substance wrought by this amendment was not very great. See WILLISTON, CASES ON BANKRUPTCY, 2 ed., 107, note; BRANDENBURG, BANKRUPTCY, 4 ed., § 60.

[3] See § 4a. "Any person except a municipal, railroad, insurance, or banking corporation shall be entitled to the benefits of this act as a voluntary bankrupt."

petition in bankruptcy for the corporation.[4] But where a state court has appointed a receiver over a corporation there is a dispute as to the power of the directors, thereafter, to petition the corporation into voluntary bankruptcy.

In a recent decision [5] a district court annulled voluntary proceedings in bankruptcy by the directors of a corporation, and the appointment of a receiver thereunder by the federal court, where it appeared that by order of the state court a receiver had already been appointed, at the instance of the stockholders, on the ground that the directors and officers of the corporation were guilty of fraud and mismanagement. The argument of the court was, that the appointment of a receiver over the corporation by the state court deprived the bankruptcy court of its jurisdiction.[6] It is clear that such action by the state court does not effect the dissolution of the corporation.[7] To refuse, therefore, to adjudicate it bankrupt, merely because of the appointment of a receiver, is to deny it the right to a discharge to which it is entitled by the Bankruptcy Act.[8] Often such a question as is here presented is confused with the case where the state and federal courts have concurrent jurisdiction.[9] There the court first in possession of the *res* retains it.[10] But the court of bankruptcy, within the limits of the bankruptcy statute, has a jurisdiction superior to that of any state court;[11] and proceedings

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[4] *In re* Kenwood Ice Co., 189 Fed. 525 (D. Minn., 1911); *In re* Foster Paint & Varnish Co., 210 Fed. 652 (E. D. Pa., 1914). See 1 COLLIER, BANKRUPTCY, 12 ed., 143; 3 FLETCHER, CYCLOPEDIA CORPORATIONS, § 1985. See also 2 ST. LOUIS L. REV. 97–105; 25 HARV. L. REV. 562.

[5] Matter of Associated Oil Co., Bankrupt, 46 Am. B. Rep. 482 (E. D. La., 1921). For the facts of this case see RECENT CASES, *infra*, p. 202.

[6] The other ground advanced by the court, namely, that in view of the peculiar facts of the case the trustee who would have been elected by the creditors would have been one of the very officers who had been found guilty of mismanagement and fraud by the state court, is hardly tenable, the law being that the trustee selected by the creditors must be approved by the referee or judge. Kiser Co. *et al. v.* Georgia Cotton Oil Co., 208 Fed. 548 (5th Circ., 1913).

[7] Penna. Steel Co. *v.* N. Y. City Ry. Co., 198 Fed. 721 (2d Circ., 1912). See 1 WILLISTON, CONTRACTS, § 305. Even a corporation which has been adjudicated bankrupt is not thereby dissolved. Nat'l Surety Co. *v.* Medlock, 2 Ga. App. 665, 58 S. E. 1131 (1907). See 1 REMINGTON, BANKRUPTCY, 2 ed., § 451½. And, where a corporation has been dissolved by a decree of a state court, its life has been extended by a fiction to permit the creditors of the corporation to file an involuntary petition in bankruptcy against it in the federal court. See 22 HARV. L. REV. 447.

[8] *In re* Marshall Paper Co., 102 Fed. 872 (1st Circ., 1900).

[9] Section 2 of the Bankruptcy Act conferred upon courts of bankruptcy two classes of jurisdiction: first, jurisdiction over the proceedings in bankruptcy initiated by the petition and ending with the distribution of the assets among the creditors and the discharge or the refusal to discharge the bankrupt; and second, jurisdiction, as an ordinary court, over suits at law or in equity in respect to the estate of the bankrupt. Lathrop *v.* Drake, 91 U. S. 516 (1875); Bardes *v.* Hawarden Bank, 178 U. S. 524 (1900). The first class of jurisdiction is exclusive. Gibbons *v.* Trust and Savings Bank, 225 Fed. 424 (W. D. Wash., 1915); Bardes *v.* Hawarden Bank, *supra*. See 1 COLLIER, BANKRUPTCY, 12 ed., 553.

[10] Martin *v.* Oliver, 260 Fed. 89 (8th Circ., 1919); Matthews & Sons *v.* Webre Co., 213 Fed. 396 (E. D. La., 1914). See 1 COLLIER, BANKRUPTCY, 12 ed., 555. For a general discussion of the matter of concurrent jurisdiction in connection with this subject see 62 U. PA. L. REV. 718–721.

[11] Bank of Andrews *v.* Gudger, 212 Fed. 49 (4th Circ., 1914). See Jacob Trieber, "Relationship of State and National Courts," 42 AM. L. REV. 321, 324; Samuel

in the bankruptcy court take precedence over those instituted in the state court, unless the creditors by the proceedings in the state court have acquired an equitable lien (more than four months old) on the property of the bankrupt.[12] No such lien was involved in this case.

The result reached by the court is, however, sound[13] and may be supported on other grounds. Two cases must be distinguished: (1) Where the receiver has been appointed by the state court merely to administer the assets of the corporation; and (2) where the receiver has been appointed to take charge of the corporation because of the mismanagement and fraudulent conduct of its officers and directors. The effect of the appointment on the powers and authority of the officers and directors differs in each of these cases. Where the appointment is merely to preserve and administer the assets of the corporation, as at the instance of some local creditor, it is sound to hold that the directors may still file a voluntary petition in bankruptcy for the corporation. Such action might even be necessary to protect all the creditors of the corporation, and prevent some from obtaining a preference. Furthermore, the directors are still the directors of the corporation;[14] and are, therefore, the proper parties to assert its right to a discharge in bankruptcy. But where a receiver is appointed by the state court to take charge of the corporation because its directors have been found guilty of fraud or mismanagement, it is the intention of the court that the receiver shall forthwith supersede those directors, whose whole authority to represent the corporation shall cease.[15] The effect of such a decree in the state court is to declare that the directors are incompetent to act for the corporation. To permit them, thereafter, to file a voluntary petition in bankruptcy, as the petition of the corporation, would in effect be to disregard the decision of the state court. This the bankruptcy court may properly refuse to do.[16] Nor is this a denial of the corporation's right to a discharge, as it is still within the power of any one[17] who represents the corporate will to file for it a voluntary petition in bankruptcy. The fundamental distinction is between the case where the directors represent the corporate will and where they do not. On its facts the principal case falls within the second classification.

Furthermore, it is generally recognized that within the limits laid

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Williston, "Effect of a National Bankruptcy Law upon State Laws," 22 HARV. L. Rev. 547.

[12] Metcalf *v.* Barker, 187 U. S. 165 (1902); Pickens *v.* Roy, 187 U. S. 177 (1902).

[13] No mention was made in the principal case of the case of Zeitinger *v.* Hargadine McKittrick Co., 244 Fed. 719 (8th Circ.. 1917), where the court reached the same result on almost identical facts.

[14] See HIGH, RECEIVERS, 4 ed., § 344 b.

[15] See HIGH, RECEIVERS, 4 ed., § 290. Many text writers and decisions fail to make any clear distinction as to the effect of the appointment of a receiver in these two situations.

[16] It is quite clear that the bankruptcy court has no authority to question the decision of the state court that the officers and directors of the corporation were guilty of fraudulent conduct and mismanagement. See BRANDENBURG, BANKRUPTCY, 4 ed., § 19.

[17] It is doubtful whether the receiver, who is an officer of the court, should be allowed to file a voluntary petition in bankruptcy for the corporation. It would be proper to permit newly elected directors to do so.

down by the Bankruptcy Act and the special rules of practice prescribed by the Supreme Court, bankruptcy proceedings are to be administered in accordance with the general principles of equity.[18] While the creditors of a corporation will not be permitted to object where the directors file a voluntary petition in bankruptcy,[19] yet in some cases it is reasonable to allow the stockholders to do so[20] for their relation to the corporation is more intimate than that of the creditors. The latter's sole claim is that the assets be kept unimpaired.[21] The former has a legally recognized interest in the life and welfare of the corporation.[22] Proceedings in bankruptcy do not deplete the corporate assets, but they do, usually, seriously injure, if not practically destroy, the corporation as a going concern. On equitable principles, therefore, and on analogy to cases where equity permits stockholders to sue or defend on behalf of the corporation whose directors fraudulently refuse to do so,[23] the bankruptcy court might well allow the stockholders to intervene where the directors are frauduently, and in utter disregard of the corporate welfare, petitioning it into voluntary bankruptcy, and might, to prevent the unconscionable exercise of a legal right, refuse to entertain such a petition.

LIABILITY OF A *DE FACTO* CORPORATION IN TORT. — Although, broadly speaking, a corporation exists *de facto* whenever associates assume without authority to act as a corporation,[1] the courts have rarely treated a group which has taken no further steps as more than a partnership.[2] But when there is a colorable compliance with a law authorizing incorporation, followed by purported corporate action, a *de facto* corporation exists in a restricted sense.[3] Here in certain cases and in favor of persons

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[18] *In re* Kane, 127 Fed. 552 (7th Circ., 1904); *In re* Broadway Savings Trust Co., 152 Fed. 152 (8th Circ., 1907); Zeitinger *v.* Hargadine, etc., 244 Fed. 719 (8th Circ., 1917); Bardes *v.* Hawarden Bank, 178 U. S. 524 (1900). See 1 COLLIER, BANKRUPTCY, 12 ed., 25; BRANDENBURG, BANKRUPTCY, 4 ed., § 10.

[19] *In re* Guanacevi Tunnel Co., 201 Fed. 316 (2d Circ., 1912); *In re* Lachenmaier, 203 Fed. 32 (7th Circ., 1913); *In re* United Grocery Co., 239 Fed. 1016 (S. D. Fla., 1917). See BRANDENBURG, BANKRUPTCY, 4 ed., § 60. And see 2 ST. LOUIS L. REV. 97.

[20] Zeitinger *v.* Hargadine-McKittrick Dry Goods Co., *supra*. For a discussion of that case and the right of the stockholders to intervene in opposition to a petition filed by the directors of a corporation, see 3 So. L. Q. 53–57.

[21] See N. J. Ins. Co. *v.* Meeker, 37 N. J. L. 282, 300; Atwater *v.* Manchester Savings Bank, 45 Minn. 341, 346, 48 N. W. 187, 189 (1891).

[22] Beal *v.* Essex Savings Bank, 67 Fed. 816 (1st Circ., 1895); Storrow *v.* Texas Mfg. Assoc., 87 Fed. 612 (5th Circ., 1898); Bijur *v.* Standard Distilling & Distributing Co., 74 N. J. Eq. 546, 70 Atl. 934 (1908).

[23] Hawes *v.* Oakland, 104 U. S. 450 (1881); Bronson *v.* LaCrosse R. R. Co., 2 Wall. (U. S.) 283 (1863). See *In re* Swofford Bros. Co., 180 Fed. 549, 553 (W. D. Mo., 1910).

[1] Appleton Mutual Fire Insurance Co. *v.* Jesser, 5 Allen (Mass.), 446, 448 (1862). "But when . . . persons were found . . . actually exercising the corporate powers, . . . they constituted a corporation *de facto*."

[2] Bradley Fertilizer Co. *v.* So. Publishing Co., 1 Misc. 512, 17 N. Y. Supp. 587 (1892); Harrill *v.* Davis, 168 Fed. 187 (8th Circ., 1909).

[3] Von Lengerke *v.* New York, 150 App. Div. 98, 134 N. Y. Supp. 832 (1912); Meramec Spring Park Co. *v.* Gibson, 268 Mo. 394, 188 S. W. 179 (1916); Spahr *v.* Farmers' Bank, 94 Pa. St. 429 (1880); Tulare Irr. Distr. *v.* Shepard, 185 U. S. 1 (1902).